

The Honorable Ronald B. Leighton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

STORMANS, INCORPORATED, doing
business as Ralph's Thriftway, et al.,

Plaintiffs,

v.

MARY SELECKY, Secretary of the
Washington State Department of Health,
et al.,

Defendants,

and

JUDITH BILLINGS, et al.,

Defendant-Intervenors.

NO. C07-5374 RBL

DEFENDANTS' BENCH BRIEF
ON FIRST AMENDMENT
ESTABLISHMENT CLAUSE
IMPLICATIONS OF RELIGIOUS
EXCEPTIONS FROM NEUTRAL
LAWS OF GENERAL
APPLICABILITY

On November 8, 2007, this Court granted Plaintiffs' Motion for a Preliminary Injunction [Dkt. No. 95], directing the State Defendants to not enforce the challenged rules against any pharmacist or pharmacy which refused but referred a patient requesting Plan B to a nearby source for Plan B. On March 6, 2009, while the Ninth Circuit decision on the appeal of the Preliminary Injunction was pending and trial was scheduled for July 2009, this Court entered the Stipulation and Order Granting Defendants and Defendant-Intervenors'

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1 Joint Motion for Stay of Proceedings Pending Decision by Ninth Circuit Court of Appeals
 2 [Dkt. No. 355]. That Stipulation and Order required the State Defendants to not enforce the
 3 subject rules against the named Plaintiffs regardless of the decision of the Ninth Circuit, until
 4 this Court had the opportunity to ultimately decide this case, if the named Plaintiffs refused
 5 and referred patients requesting Plan B to a nearby source for Plan B.

6 Plaintiffs' case in chief and, on occasion, this Court's questions have suggested that a
 7 "refuse and refer" alternative would accommodate Plaintiffs' religious beliefs. RealTime
 8 Transcript of Proceedings, Dec. 9, 2011, 119:21-24 (Court's examination of Susan Boyer).
 9 For the reasons stated herein, an accommodation specific to Plaintiffs' religious beliefs and
 10 objections would implicate the prohibitions in the First Amendment's Establishment Clause.

11 **THE ESTABLISHMENT CLAUSE IS VIOLATED WHEN GOVERNMENT**
 12 **DIFFERENTIATES AMONG RELIGIOUS BELIEFS**

13 As Justice Kennedy discusses in his majority opinion in *Lee v. Weisman*, "[t]he
 14 principle that government may accommodate the free exercise of religion does not supersede
 15 the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*,
 16 505 U.S. 577, 587 (1992). Justice Kennedy explains that "the lesson of history that was and
 17 is the inspiration for the Establishment Clause, the lesson that in the hands of government
 18 what might begin as a tolerant expression of religious views may end in a policy to
 19 indoctrinate and coerce." *Id.* at 591-92. While in *Weisman*, the Court was examining the
 20 issue of including prayers in the graduation ceremonies in the public schools, the following
 21 quote seems equally applicable when patients are unable to access health care due to
 22 imposition of religious beliefs by those entrusted with a state license to provide health care:

23 What to most believers may seem nothing more than a reasonable request that
 24 the nonbeliever respect their religious practices, . . . may appear to the
 25 nonbeliever or dissenter to be an attempt to employ the machinery of the State
 26 to enforce a religious orthodoxy.

Weisman, 505 U.S. at 592.

1 The Board's Pharmacists' Professional Responsibilities rule permits pharmacists to
 2 refuse to provide health care for any reason; however, the Board assured timely access to
 3 health care by requiring the pharmacy to deliver medications for its patients. Wash. Admin.
 4 Code § 246-863-095. If this Court allows pharmacies to interpose their religious beliefs to
 5 deny health care to its patients, the Court would put the state in the role of endorsing the
 6 religious beliefs which view life as commencing upon fertilization. This is not permissible
 7 under the First Amendment's Establishment Clause.

8 As recognized in *Lemon v. Kurtzman*, the analysis whether government activity
 9 violates the First Amendment's Establishment Clause begins with an examination of whether
 10 (1) the statute or regulation has a secular legislative purpose, (2) its principal or primary
 11 effect is one that neither advances nor inhibits religion, and (3) it fosters excessive
 12 government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).
 13 A specific exclusion in the Board's Pharmacies' Responsibilities Rule, Wash. Admin. Code §
 14 246-869-010, and, presumably, the Board's stocking rule, Wash. Admin. Code § 246-869-
 15 150, for pharmacies which believe life begins upon fertilization and that Plan B and *ella* end
 16 human life implicates the second and third prong of the *Lemon* test.

17 In *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,
 18 the Court noted that "*Lemon's* 'purpose' requirement aims at preventing . . . [government]
 19 from abandoning neutrality and acting with the intent of promoting a particular point of view
 20 in religious matters." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day*
 21 *Saints v. Amos*, 483 U.S. 327, 335 (1987). Carving out an exception for a specific class of
 22 medication or for those who believe that life begins upon fertilization (or both) abandons the
 23 neutrality in the Board's rules and advances "a particular point of view in religious matters."
 24 *Id.* In addition, as discussed in *Lemon*, the excessive entanglement with religion would be
 25 fostered even when "[a] given law might not establish a state religion but nevertheless be one

1 ‘respecting’ that end in the sense of being a step that could lead to such establishment and
 2 hence offend the First Amendment.” *Lemon*, 403 U.S. at 612,

3 As recognized in *McCreary Cy. v. ACLU*,

4 *Manifesting a purpose to favor one faith over another*, or adherence to
 5 religion generally, clashes with the ‘understanding, reached . . . after
 6 decades of religious war, that liberty and social stability demand a religious
 7 tolerance that respects religious views of all citizens By showing a
 purpose to favor religion, the government ‘sends the . . . message to . . .
 nonadherents that they are outsiders, not full members of the political
 community, and an accompanying message to adherents that they are
 insiders, favored members

8 *McCreary Cy. v. ACLU*, 545 U.S. 844, 860 (2005), citing *Zelman v. Simmons-Harris*, 536
 9 U.S. 639, 718 (2002) and *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309-10
 10 (2000), (emphasis added) (internal quotes omitted). The Court also notes in *McCreary*
 11 *County*, “[t]he touchstone for our analysis is the principle that the First Amendment mandates
 12 governmental neutrality *between religion and religion, and between religion and*
 13 *nonreligion.*” *McCreary*, 545 U.S. at 860 (emphasis added). *See also, Cy. of Allegheny v.*
 14 *ACLU*, 492 U.S. 573, 610-11(1989) [“The government does not discriminate against any
 15 citizen on the basis of the citizen’s religious faith if the government is secular in its functions
 16 and operations. On the contrary, the Constitution mandates that the government remain
 17 secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to
 18 avoid discriminating among citizens on the basis of their religious faiths. . . . To be sure, in a
 19 pluralistic society there may be some would-be theocrats, who wish that their religion were
 20 an established creed, and some of them perhaps may be audacious enough to claim that the
 21 lack of established religion discriminates against their preferences. But this claim gets no
 22 relief, for it contradicts the fundamental premise of the Establishment Clause itself.”].

A Generalized Exception For All Religious Beliefs Is Not Required Under the First Amendment And Intrudes Into the Policy Decision Of The Board

Plaintiffs have not, and cannot, point to any authority requiring that neutral laws of general applicability include an exception for all religious beliefs.¹ Nor, as illustrated by the cases cited above, can they demand an exception solely for the religious beliefs of the three Plaintiffs.

The Board went through an exhaustive public process before adopting Wash. Admin. Code §§ 246-863-095 and 246-869-010. The Board heard and reviewed testimony and public comments from individuals and organizations requesting a religious or conscience exception. Other public testimony and comments suggested allowing pharmacists and pharmacies to decide for *any* reason not to serve this patient, or not to dispense particular medications. After evaluating all of the extensive public comment, the Board exercised its legislative authority and adopted rules which did not shift the burden to patients for time critical access to medications for their health care needs. The Board adopted these rules consistent with their mission to assure safe access to health care for the people of this state.

These rules are neutral and generally applicable, reflecting a careful balancing of the public interests by the Board. There is a rational basis for these rules. The Court should not substitute its judgment for that of the Board, even if the Court would have balanced the public interests differently and would have proposed a different rule. *See, F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *National Assoc. for Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1051 (9th Cir. 2000).

¹ Legislation may include a generalized exception, such as the *opt-in* provision in the Death with Dignity Initiative, Wash. Rev. Code § 70.245.190(d) and (2)(a), and the Congressionally enacted Section 6(j) of the Military Selective Service Act, 50 U. S. C., App. 456(j), for conscientious objectors to military conscription; however, such grants of legislative grace are not constitutionally mandated. *In re Summers*, 325 U.S. 561, 572-73 (1945); *Hamilton v. Regents*, 293 U.S. 245, 264 (1934).

CONCLUSION

It would have been unconstitutional for the Board to single out a specific religious belief for different treatment under the rules. The Board's decision to not carve out the specific exception desired by the Plaintiffs does not make the rules unconstitutional under the First Amendment's free exercise clause. Singling out Plaintiffs' religious belief for different treatment violates the Establishment Clause of the First Amendment.

While the Court may be of the opinion that it would have balanced the multiple public interests differently and proposed a different rule, the Court should not substitute its judgment for that of the Board. This Court is not being asked to evaluate the wisdom of the option chosen by the Board. Instead, the Court is being asked to decide if the Board's rules are unconstitutional. The Court is not being asked whether it agrees with how the Board exercised its discretion.

Under the legal standards which this Court must apply, the Board's rules are neutral and generally applicable. The Plaintiffs have not negated every rational basis. The rules treat all pharmacies and pharmacists the same. The Board adopted the rules applying the process that was due. The Board's rules are constitutional.

RESPECTFULLY SUBMITTED this 21st day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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